

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLOTTE GEMMEL	:	DETERMINATION
		DTA NO. 819222
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1996 and 1997.	:	

Petitioner, Charlotte Gemmel, P.O. Box 166, Orient, New York 11957, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1996 and 1997.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 16, 2003 at 12:30 P.M., with all briefs submitted by May 15, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by Stephen L. Solomon, Esq., and Roger S. Blane, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioner has shown that she was not domiciled in New York State and New York City during 1996 and 1997 and therefore not subject to tax as a resident individual pursuant to Tax Law § 605(b)(1)(A) and New York City Administrative Code § 11-1705(b)(1)(A).

II. If petitioner is subject to tax as a resident of New York State and City, whether she has established her entitlement to resident credit for income tax paid to the State of California for the years at issue pursuant to Tax Law § 620.

FINDINGS OF FACT

1. On February 5, 2001, following an audit, the Division of Taxation (“Division”) issued to petitioner, Charlotte Gemmel, a Notice of Deficiency which asserted \$612,943.05 in additional New York State and City personal income tax due, plus interest, for the years 1996 and 1997. Specifically, the notice asserted \$315,487.09 and \$197,301.85 in additional State and City income tax, respectively, for 1996. The notice asserted \$60,762.17 and \$39,391.94 in additional State and City income tax, respectively, for 1997. The deficiency resulted from the Division’s conclusion that petitioner was properly subject to tax as a resident of New York State and City for the years 1996 and 1997. Accordingly, the Division determined that all of petitioner’s income for the years at issue was New York adjusted gross income.

2. Petitioner was born in 1939. She is one of seven children and she grew up on Long Island. During the years at issue, one of petitioner’s siblings lived in the Los Angeles area, two lived in the Tacoma, Washington area, and three lived on Long Island, New York. Petitioner’s mother lived on Long Island during the years at issue.

3. In 1960, petitioner began to live with Maureen Sanders. Petitioner and Ms. Sanders’ relationship as life partners continued throughout the relevant period and continues to the present time.

4. In 1981 petitioner and Ms. Sanders purchased a brownstone located at 415 Third Street, Brooklyn, New York (“the brownstone”). Ms. Sanders provided the down payment for the purchase from her own funds. At the time of the purchase, the brownstone consisted of seven

separate apartments. Petitioner and Ms. Sanders acquired the property both for residential and investment purposes. In the early 1990s petitioner and Ms. Sanders had major construction performed on the brownstone to renovate it and to convert it to four separate apartments. During the construction period petitioner and Ms. Sanders moved throughout the brownstone and lived in the apartments which were not under renovation at that time. The construction was completed in 1993.

5. During the construction period, petitioner and Ms. Sanders rented most of their furniture because of the dust resulting from the construction. The pieces of furniture that they did own during this period were mainly “hand-me-downs” from Ms. Sanders’ relatives. These pieces consisted of Ms. Sanders’ mother’s dining room table, chairs, buffet and cabinet, Ms. Sanders’ great-grandmother’s sewing cabinet and one other piece of furniture.

6. After the construction was completed, petitioner and Ms. Sanders’ apartment consisted of two floors of the brownstone with a double parlor, kitchen, formal dining room, and guest room on one floor and a master bedroom, library, and study on the other floor. The double parlor was furnished with a couch and chairs purchased by petitioner and Ms. Sanders before petitioner moved to California in 1993 (*see*, Finding of Fact “14” *et seq.*). The master bedroom was sparsely decorated in a Japanese style with a futon, tatami mats, and a shoji screen.

7. Petitioner began her professional career in 1961 as a high school mathematics teacher. In 1968, she changed professions and began to work in the textbook publishing industry as an editor at MacMillan. Petitioner worked at MacMillan for 14 years, rising through the ranks to become vice president of marketing and then vice president and editor-in-chief of high school product development.

8. In 1982, petitioner left MacMillan to work for another textbook publishing company, Silver Burdett, as senior vice president and editor-in-chief for kindergarten through twelfth grade textbook publishing. In 1988, petitioner became president of the newly-merged Silver Burdett Ginn Publishing Company.

9. While at Silver Burdett, petitioner met Mary Ruth Sangster, who was also employed at the company. Petitioner hired Ms. Sangster as her executive assistant responsible for the handling of petitioner's business and personal matters, including arranging her meeting and travel plans.

10. In 1990, petitioner left Silver Burdett Ginn to work for a joint venture of MacMillan and McGraw-Hill School Publishing Company in New York City as a senior vice president. When she went to the joint venture she brought Ms. Sangster along to work as her executive assistant.

11. In March 1993, petitioner left the joint venture because of a change in management. She then began looking for a job in other areas of the textbook publishing industry. Petitioner was considering a change to the area of supplemental publishing. Supplemental materials are used in conjunction with textbooks.

12. In April 1993, while still unemployed, petitioner was contacted by a friend who was on the board of directors of Educational Publishing Company ("EPC"), a supplemental publishing company located near San Francisco, California. The friend asked petitioner if she would be interested in the position of president and chief executive officer of EPC. Petitioner informed her friend that she did not want the position because she was unwilling to move to San Francisco.

13. Petitioner subsequently attended a seminar in San Antonio, Texas in May 1993 at which she met with the owners of EPC. At that meeting she was again offered the position of president and CEO of EPC, and she again turned it down because she did not wish to leave New York. The owners of EPC then asked petitioner to consult for that company because they were in the process of developing a math program. Petitioner accepted the consulting position and began traveling between New York and California during the months of May, June and July 1993. During this period, EPC continued to offer her the position of president and CEO.

14. By July 1993 petitioner had become interested in doing more work with EPC and decided to accept the position of president and CEO. Although she had done virtually everything else in the textbook publishing industry, she had never been president and CEO of a company before and she looked forward to the challenge. Her new position would make her the first woman president and CEO in the publishing industry. Petitioner's new position was for an indefinite term. Her goal was to grow the company and, if successful, either take EPC public or arrange for its sale. In either case, petitioner intended to remain with the company after a sale or taking it public.

15. Petitioner's position as president and CEO of EPC required that she move to the San Francisco Bay area of California. The position further required extensive work-related travel.

16. Before she accepted the position with EPC, petitioner discussed the opportunity and move with Ms. Sanders. Petitioner concluded that her move to California would not adversely affect their relationship. Petitioner had frequently traveled in her career in educational publishing. It had not been unusual for her to be away from the brownstone for an entire Monday-through-Friday work week. Additionally, petitioner and Ms. Sanders had previously lived apart while Ms. Sanders pursued her education.

17. Ms. Sanders chose to remain in New York to continue to pursue her interests. She also continued to take care of the brownstone, petitioner's personal finances and tax matters, and their dog. Petitioner would be unable to have a dog in California due to the extensive travel required in her work and the fact that she would be living alone.

18. Immediately after accepting the position of president and CEO, petitioner went to a real estate agent intending to rent an apartment. She was unable to locate an apartment she liked, so the agent showed her a furnished house for rent at 271 Addison Avenue, Palo Alto, California. Although petitioner was unable to gain access to the house at that time, based upon the house's bungalow style, her inspection of its exterior and its yard and her peeking through the windows, she decided to rent it. The house was a small but substantial property.

19. On August 9, 1993 petitioner entered into a lease for the house at 271 Addison Avenue for the period August 19, 1993 through September 1, 1994. Petitioner did not negotiate the term of the lease. The real estate agent presented a one-year lease to her for signing. It was petitioner's understanding that a one-year lease was standard in California. The lease authorized petitioner to "plant flowers of her choosing in the gardens." She planted perennials, annuals, and rose bushes at the Addison Avenue property. She also installed large planters, a pathway and stepping stones; lined the walkway and had the sprinkler system repaired. In addition, the lease permitted visits by petitioner and Ms. Sanders' dog.

20. Petitioner continued to rent the Addison Avenue house for a period of about four years and four months, until January 31, 1998. During that period she did not always have a written lease with the landlord. Written leases covered the period August 19, 1993 through September 1, 1994; September 1, 1994 through August 31, 1995; and September 1, 1996 through August 31, 1997. These leases were generally similar to the original lease except that the lease

for the period September 1, 1996 through August 31, 1997, which was executed in November 1996, contained a provision that the lease was being signed by petitioner with the “understanding that [petitioner] could sublet should it become necessary for [petitioner] to leave the area, which at this time [petitioner] does not anticipate.”

21. At around the time of the execution of the November 1996 lease, petitioner began to “toy with the idea” of purchasing a home in the nearby areas of Portola Valley and Atherton, California. Other than looking at some homes, petitioner did not progress beyond the stage of considering such a purchase and took no concrete steps toward buying a home in California.

22. Soon after petitioner accepted her position as president and CEO of EPC, she offered Ms. Sangster a job with the company in California as her executive assistant. At that time Ms. Sangster was divorced and living in a two-bedroom apartment in Bloomfield, New Jersey which she furnished with her own furniture. Her immediate family also lived in New Jersey, including her 18-year old daughter. In October 1993, Ms. Sangster accepted the offer to work with petitioner in California. She asked her daughter to move with her to California, but her daughter declined. Ms. Sangster rented an unfurnished two-bedroom apartment in California. She did not have a written lease. She furnished the apartment with her furniture from New Jersey. From October 1993 through November 1997, Ms. Sangster rented an apartment in California not far from petitioner.

23. When petitioner moved to California she took a suitcase and a bag full of clothes. In addition, petitioner had the moving company that moved Ms. Sangster’s belongings take some of petitioner’s belongings from New York to California. Such items included her tanning machine, rowing machine, bicycle, some clothes and other items. The moving truck was paid for by EPC.

24. Shortly after petitioner moved to California, Ms. Sanders began to send her boxes with more of her personal belongings. The first few boxes sent to petitioner by Ms. Sanders weighed approximately 212 pounds. During the period that petitioner lived in California Ms. Sanders continued to send petitioner boxes containing more of her personal belongings.

25. Petitioner furnished her office at EPC in California. Some of the pieces she purchased were paid for by the company and some were paid for personally by petitioner. Specifically, petitioner purchased a love seat and chairs for her office. This was the first time in her career that petitioner spent her own money to furnish her office.

26. In September 1994, petitioner and Ms. Sanders refinanced the mortgage on their brownstone in New York. They applied for a mortgage with a lender located in Staten Island, New York. The loan application requested the address of the applicant, to which petitioner provided 271 Addison Avenue, Palo Alto, California. At about the time of petitioner's separation from EPC in 1998, the mortgage debt was approximately \$300,000.00.

27. The terms of petitioner's employment agreement with EPC were memorialized in a term sheet dated November 16, 1994. The term sheet provided for employment with the company for an indefinite period of time and severance payments if petitioner discontinued employment. The severance provision addressed a discontinuance of employment as late as June 30, 1998. The term sheet also provided for a salary of \$225,000.00 and a housing and travel allowance of \$30,000.00. Petitioner's base salary plus the housing and travel allowance was approximately equal to petitioner's compensation from her previous employer.

28. The term sheet also provided for petitioner to receive EPC stock options, which would vest over a five-year period. Petitioner had received stock options with previous employers, but had not earned much money from them.

29. Money was not the motivating factor for petitioner to take the job with EPC.

30. The term sheet provided for annual reviews and evaluations of petitioner's job performance. Petitioner did not consider this provision as limiting her stay in California.

31. The term sheet also provided that "Educational Publishing Company will pay reasonable relocation expenses, not to include the relocation of employee's entire household." EPC was aware that petitioner did not have "an entire household" to move; she had no children, cars, or pets to move. EPC paid all costs incurred by petitioner in moving to California. Also as part of her employment agreement, EPC gave her the use of a car.

32. EPC purchased life insurance on the life of petitioner with the company as beneficiary. The life insurance application completed by petitioner for the policy requested her residence address. Petitioner completed the application in May 1995 and listed her residence address as 271 Addison Avenue, Palo Alto, California.

33. When petitioner became president and CEO of EPC, the financial division of the company, including its chief financial officer, was located in Illinois. After her tenure began she moved the financial division, including the chief financial officer, to the home office in California.

34. After becoming president and CEO, petitioner made regular visits to New York. When petitioner returned to New York she usually stayed at the brownstone. She sometimes stayed with her mother or her sisters on Long Island.

35. Petitioner's travel to New York during the years at issue was frequently in conjunction with business travel to Chicago.

36. While petitioner was living in Palo Alto, California, she spent a substantial amount of time and money on her garden. This included the cost of plants and flowers. Gardening was petitioner's primary leisure activity.

37. Before petitioner moved to California she did not consult with a tax professional regarding the potential consequences of such a move on her New York residency status for New York income tax purposes. Petitioner's tax returns for the years 1993 through 1995 were prepared by a "store front" tax preparation firm in Brooklyn called "Tax World." Tax World prepared petitioner's 1993 through 1995 tax returns as a New York resident. Ms. Sanders dealt with Tax World on petitioner's behalf. She would bring the necessary papers to Tax World's location and have the returns prepared. Petitioner did not have any contact with Tax World in the preparation of her returns.

38. One of petitioner's goals at EPC was to have a specific math program which was then in development accredited and used throughout California and the United States. The program was introduced and was very successful. Approximately 60 percent of California schools used the program, and it was also adopted by the United States military for use in its schools. The success of this program caused EPC's revenues to increase substantially.

39. The company grew faster than anticipated. Sales revenue increased from \$40 million in 1993 to \$70 million in 1995. Since petitioner's first goal to "grow" the company was accomplished, the next step was to try to sell the company or take it public. In either case, petitioner wanted to continue to run the company.

40. In October or November 1995, as part of this next step, petitioner attended an investors conference where various companies were presented to the investment community. At the conference, petitioner met with individuals from the Tribune Company, headquartered in Chicago, a potential buyer of EPC and other potential investors.

41. Following negotiations, EPC and the Tribune Company reached an agreement at the end of 1995 by which Tribune would purchase EPC for \$200 million. A condition of the sale

was that petitioner would continue to run the company. During the negotiations, there was some discussion as to whether EPC would remain in California or move to Chicago, the site of Tribune's headquarters. Petitioner indicated at that time that she would remain with the company only if it stayed in California.

42. In January 1996, petitioner signed a term sheet to continue to run EPC for the Tribune Company. In March 1996, a formal employment agreement was entered into which also provided that petitioner would continue to run EPC after its acquisition. The agreement further provided, among other items, that:

a) To induce Tribune to enter into the merger agreement and consummate the transaction, petitioner agreed to enter into the employment agreement;

b) The term of the employment agreement was three years;

c) Unless approved by petitioner in advance, the office of the executive (petitioner) would be in the State of California for the term of the employment agreement;

d) At the reasonable request of the company from time to time, petitioner would be available for travel to and consult with the company and attend professional conventions and meetings.

43. A three-year contract was the standard employment contract offered by the Tribune Company. In petitioner's experience, it was standard industry practice that a subsequent contract would not be entered into, but that if the parties desired to continue working together, they would continue to follow the terms of the original contract with modifications to the compensation portion.

44. In March 1996 the transaction was completed and the Tribune Company purchased EPC. Upon the closing of the transaction petitioner's stock options in EPC were exercised and sold. Petitioner realized a substantial gain on the sale.

45. Petitioner continued to run EPC after its acquisition by Tribune. While working at EPC petitioner was chairperson of the California chapter of the Association of American Publishers.

46. The law firm of Paul, Hastings, Janofsky and Walker represented EPC during the negotiations for the sale of the company. The law firm was predominantly a California firm, but also had a substantial presence in New York. The attorney at the firm handling the sale for EPC was Barry Brooks, Esq., who was affiliated with the firm's New York office.

47. Petitioner worked with Mr. Brooks during the sale of EPC. In 1996, after the sale of the company, Mr. Brooks advised petitioner to seek professional tax advice to address the Federal tax treatment of her increased income. He recommended Myles Schumer, CPA, a partner in the New York accounting firm of Cornick, Garber, and Sandler. Mr. Schumer was contacted by Ms. Sanders on petitioner's behalf, and they met and addressed the Federal tax consequences of petitioner's additional income. In addition, Mr. Schumer informed Ms. Sanders that based on his review of the facts and circumstances of petitioner's life, petitioner should file income tax returns as a domiciliary of California for the year 1996. Mr. Schumer prepared an income tax projection to calculate the appropriate California state tax payment to be made before the end of 1996 to entitle petitioner to a Federal income tax deduction for such payment since petitioner's increased income was concentrated in the 1996 tax year.

48. For the years 1996 and 1997 petitioner filed income tax returns as a resident of the State of California and a nonresident of New York. On her 1996 and 1997 New York nonresident returns petitioner wrongly answered "No" to the question "Did you or your spouse maintain living quarters in New York State in [the year in question]?"

49. In years prior to her move to California, petitioner had made a trip to Paris where she purchased a significant amount of art prints. In addition, petitioner had other pieces of art, such

as pieces she bought in Mendocino, California, as well as some unframed Japanese art she brought to California from the brownstone in New York. Petitioner had all these pieces framed and hung them in her home in California in February 1996. The cost of framing these pieces was approximately \$5,500.00. Also, while petitioner's home in California was furnished by the landlord, she brought some furniture from New York and purchased accessories for the house.

50. While in California, petitioner obtained a California driver's license. Additionally, since petitioner's 1996 employment agreement provided for a car allowance and not the use of a company car, petitioner purchased and registered a car in California in 1996.

51. While in California, petitioner's mother would visit her every summer and stay about a month. Petitioner's three siblings who resided on the West coast, near Los Angeles and Tacoma, Washington, got together with petitioner more often than before her move to California. This was because petitioner's home in California was a more convenient meeting place.

52. Ms. Sanders periodically visited petitioner during her time in California, with one extended stay of about four to five weeks each year.

53. During the years 1993 through 1997, petitioner used California doctors and dentists. She had a blood disease, an elevated platelet count, that was being treated by a doctor in New York before she moved to California. When she moved to California in 1993, she switched to a specialist in California.

54. For more than 20 years, before moving to California, petitioner had her hair colored at the same salon in New York. Beginning in 1993, when she moved to California, she began to use a salon in California and discontinued using the salon in New York. She continues to use her California hair colorist when she travels to California.

55. In early 1997, petitioner and Ms. Sangster began to have difficulty getting along. Due to their differences, Ms. Sangster sought to resign as petitioner's executive assistant. At

petitioner's request, Ms. Sangster agreed to remain in her position until she was able to locate and train a replacement.

56. In September 1997, Ms. Sanders was diagnosed with ovarian cancer. Shortly thereafter she underwent surgery. Subsequent to Ms. Sanders' surgery on October 13, 1997, petitioner decided to move to New York to be with Ms. Sanders. By January 1998, she had resigned her position at EPC, left California and moved to New York.

57. Due to petitioner's decision to move to New York to be with Ms. Sanders, Ms. Sangster was no longer required to find her replacement. In addition, Ms. Sangster was having some family difficulties in New Jersey. In November 1997, Ms. Sangster moved to New Jersey.

58. On January 31, 1998, petitioner moved out of the house at 271 Addison Avenue, Palo Alto, California.

59. After petitioner moved to New York in January 1998, she did not render any services to EPC.

60. When petitioner and Ms. Sangster moved from California back to New York and New Jersey, respectively, they each hired a moving van to take their respective possessions. The estimated cost of moving for Ms. Sangster and petitioner was \$6,000 and \$6,300, respectively. The moving company's estimate for petitioner's move to New York estimated 60 boxes and total contents to be moved, including a car, of approximately 8,000 pounds.

61. Petitioner moved the furniture that she had purchased for her office and home in California to New York as part of her move.

62. In 1998, after petitioner moved back to New York, the brownstone was her only residence.

63. In September 1999, petitioner bought a house in Orient, New York. She and Ms. Sanders continue to own the brownstone.

64. In the summer of 2003, petitioner began employment as senior vice president of the kindergarten division of McGraw-Hill, a textbook publisher. This was not the same company she worked for in the early 1990s.

65. During the years at issue, petitioner spent the majority of her time in California.¹ She was not actively connected to New York on a regular basis.

66. During petitioner's time in California, rental income covered most of the cost of maintaining the brownstone. If additional funds were needed to maintain the brownstone, petitioner provided such funds.

67. Petitioner had wage income from EPC of \$4,341,562.00 in 1996, and her employer withheld \$268,630.67 in California income tax on such income. By check dated December 9, 1996, and payable to the California "Franchise Tax Board," petitioner also made an estimated income tax payment of \$220,000.00 in respect of her 1996 California income tax liability. Petitioner's 1996 California resident income tax return is not in the record.

68. Petitioner had wage income from EPC of \$883,711.00 in 1997, and her employer withheld \$61,837.87 in California income tax on such income. Petitioner's 1997 California resident income tax return also reports a \$27,000.00 payment for "1997 California estimated tax and amount applied from your 1996 return." Petitioner's 1997 California resident return reports

¹ At hearing petitioner presented day count summaries prepared by her representative and summaries of her travel itineraries prepared by Ms. Sangster. Such evidence purports to show that petitioner took ten trips to New York in 1996 and that she was present in New York a total of 71 days in 1996. For 1997, such evidence purports to show that petitioner took 16 trips to New York and that she was present in New York a total of 96 days. The evidence also purports to show that petitioner was present in California 288 days in 1996 and 261 days in 1997. The day count summaries are based on Ms. Sangster's travel itinerary summaries, which purport to document the dates on which petitioner traveled and do not purport to document petitioner's location on each and every day of the years at issue. No direct documentation of petitioner's whereabouts on specific days, such as airline tickets, hotel receipts, or credit card receipts was submitted. Moreover, petitioner offered no testimony of her whereabouts on specific days during the period at issue. Accordingly, petitioner's day count evidence is insufficient to prove petitioner's presence in California and New York as claimed. This determination does find, however, that petitioner spent the majority of her time in California during the years at issue. This finding of fact is based on petitioner and Ms. Sangster's credible testimony regarding petitioner's general pattern of activity, and the auditor's conclusion in her work papers, following an examination of petitioner's 1996 credit card activity, that petitioner "was not actively connected to N.Y.S. on a regular basis."

\$80,784.00 as the tax due. Petitioner's 1997 New York nonresident return includes as part of petitioner's Federal adjusted gross income computation, \$78,289.00 in "taxable refunds, credits or offsets of state and local income taxes."

69. Petitioner submitted proposed findings of fact numbered "1" through "70." The following proposed findings of fact are accepted and have been incorporated into the findings of fact herein: "1" through "20", "25", "26", "28" through "31", "33", "34", "36", "37", "39" through "44", "46" through "51", "54", "56", "57", "59", "61" through "63", "66", and "70". The following proposed findings of fact are rejected in whole or in part as unsupported by the record: "21" through "24", "32", "35", "38", "45", "52", "55", "58", "60", "65", and "68". The following findings of fact are rejected in whole or in part on the grounds of relevance: "27", "53", "64", "67", and "69".

CONCLUSIONS OF LAW

A. Tax Law § 601 imposes New York State personal income tax on "resident individuals." At issue in the present matter is whether petitioner is a "resident individual" as defined in Tax Law § 605(b)(1)(A) as someone "who is domiciled in this state." For New York City income tax purposes, the definition of resident is identical to that for State income tax purposes, except for the substitution of the term "city" for "state" (*see*, New York City Administrative Code § 11-1705[b][1][A]).

B. The Division's regulations define "domicile" in relevant part as follows:

(1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is

upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicated that such individual did this merely to escape taxation.

* * *

(4) A person can have only one domicile. If such person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive.

C. It is well established that an existing domicile continues until a new one is acquired and the party alleging the change bears the burden to prove, by clear and convincing evidence, a change in domicile (*see, Matter of Bodfish v. Gallman*, 50 AD2d 457, 378 NYS2d 138). Whether there has been a change of domicile is a question "of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals" (*Matter of Newcomb's Estate*, 192 NY 238, 250). The test of intent with regard to a purported new domicile is "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (*Matter of Bourne*, 181 Misc 238, 41 NYS2d 336, 343, *affd* 267 App Div 876, 47 NYS2d 134, *affd* 293 NY 785); *see also, Matter of Bodfish v. Gallman, supra*). While certain declarations may evidence a change in domicile, such declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life" (*Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989, *citing Matter of Trowbridge, supra*).

D. In *Matter of McKone v. State Tax Commission* (111 AD2d 1051, 490 NYS2d 628, *affd* 68 NY2d 638, 505 NYS2d 71) the Court favorably quoted the following treatises on the intent necessary to establish domicile:

The intention necessary for acquisition of a domicile may not be an intention of living in the locality as a matter of temporary expediency. It must be an intention to live permanently or indefinitely in that place. But it need not be an intention to remain for all time; it is sufficient if the intention is to remain for an indefinite period. (25 Am Jur 2d **Domicile** § 25, at 19[1966].)

When a person has actually removed to another place, which is his fixed present residence, with an intention of remaining there for an indefinite time, it becomes his place of domicile, notwithstanding he may have a floating intention to return to his former domicile at some future and indefinite time. (28 C J S **Domicile** § 11, at 19[1941].)

Though the idea of permanency is sometimes involved in the domicile concept, the term “domicile” is more safely defined in the negative rather than affirmative. A person’s domicile is the place he is making his home not “with” a present intention to remain there forever, but “without” a present intention of leaving at some particular future time. (Siegel, Practice Commentary, McKinney’s Cons. Laws of N.Y., Book 58A, SCPA 103, p. 21.) (**Matter of McKone v. State Tax Commn.**, *supra*, 490 NYS2d at 630.)

E. While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer’s general habits of living demonstrate a change of domicile. “The taxpayer must prove his subjective intent based upon the objective manifestation of that intent displayed through his conduct” (**Matter of Simon**, Tax Appeals Tribunal, March 2, 1989). Among the factors that have been considered are: (1) the retention of a permanent place of abode in New York (*see, e.g., Gray v. Tax Appeals Tribunal*, 235 AD2d 641, 651 NYS2d 740 *confirming Matter of Gray*, Tax Appeals Tribunal, May 25, 1995; **Matter of Silverman**, Tax Appeals Tribunal, June 8, 1989); (2) the location of business activity (**Matter of Erdman**, Tax Appeals Tribunal, April 6, 1995; **Matter of Angelico**, Tax Appeals Tribunal, March 31, 1994); (3) the location of family ties (**Matter of Gray**, *supra*; **Matter of Buzzard**, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852, 613 NYS2d 294); (4) the location of social and community ties (**Matter of Getz**, Tax Appeals Tribunal, June 10, 1993); and (5) formal declarations of domicile (**Matter of Trowbridge**, 266 NY 283, 289; **Matter of Gray**, *supra*; **Matter of Getz**, *supra*).

F. Upon review of the entire record and pursuant to the foregoing standards, it is concluded that petitioner has proven, by clear and convincing evidence, that she gave up her New York domicile and acquired a domicile in the State of California as of the years at issue.

Petitioner's daily life was unquestionably centered in California during the years at issue. From the time she became president and CEO of EPC in 1993, she was employed there, she maintained a residence there, and she spent most of her time there. The term of petitioner's employment as president and CEO of EPC was indefinite and the record establishes that petitioner intended to continue as CEO of EPC in California for an indefinite period until the unforeseen change in circumstances of Ms. Sanders' illness led to her resignation. At the time of the sale of EPC to Tribune, petitioner even made EPC's continuing presence in California a condition of her remaining as CEO (*see*, Findings of Fact "41" and "42"). The circumstances of her employment thus strongly support petitioner's claim of a California domicile (*see*, *Matter of McKone v. State Tax Commn.*, *supra*, 490 NYS2d at 630).

The length of time spent by petitioner in California during the years at issue also supports her claim of a California domicile. This is an "important" fact to be considered in determining petitioner's domicile (*see*, 20 NYCRR 105.20[d][4]). Although petitioner did not establish the number of days spent in New York and California during the years at issue, she did establish that she spent the majority of her time in California during those years (*see*, Finding of Fact "65"). Furthermore, she was not actively connected to New York on a regular basis (*id.*).

The fact that petitioner leased her residence in California and owned a residence in New York would seem to weigh against petitioner's position (*see*, *Matter of Zapka*, Tax Appeals Tribunal, June 22, 1989). This fact is offset, however, by petitioner's limited use of the brownstone during the years at issue and her extensive use of the Addison Avenue home.

Further, petitioner's gardening at the Addison Avenue home (*see*, Finding of Fact "19" and "36"), her artwork at the Addison Avenue home (*see*, Finding of Fact "49"), and her gradual accretion of personal possessions at the Addison Avenue home (*see*, Findings of Fact "23," "24" and "60") supports a finding that the Addison Avenue home was petitioner's "permanent home . . . with the range of sentiment, feeling and permanent association with it" (*Matter of Bourne, supra*). That petitioner signed leases with one-year terms is of little moment since such terms appears to have been standard and were not negotiated by petitioner (*see*, Finding of Fact "19"). Additionally, petitioner's use of doctors, dentist and hair colorist in the vicinity of her California home during the years at issue (*see*, Findings of Fact "53" and "54"), and her acquisition of a California driver's license and a car in California (*see*, Finding of Fact "50") are consistent with the fact that petitioner's "general habit of life" was centered in California during the years at issue (*Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989, *citing Matter of Trowbridge, supra*). Finally, although less persuasive than the informal acts demonstrating such "general habit of life," petitioner's consistent use of the Addison Avenue address on various documents during the years at issue (*see*, Findings of Fact "26" and "32") also supports a finding that she changed her domicile.

G. There are also facts in the record supportive of the Division's position that petitioner did not give up her New York domicile and did not acquire a California domicile as of the years at issue. Specifically, petitioner continued to own, maintain and use the brownstone she had owned and where she had maintained a residence since 1981. Petitioner and Ms. Sanders purchased the brownstone in 1981 and made a significant investment commencing in 1990 to refurbish the structure, transforming seven apartments into four and creating a two-floor residence for themselves. Although Ms. Sanders owned most of the furniture, petitioner, along with Ms. Sanders, purchased some furniture for the brownstone prior to her move to California.

The significance of petitioner's continuing ownership of the brownstone is tempered by the fact that such ownership did not impose a significant financial burden. Rental income covered most of the cost of maintaining the brownstone during the years at issue (*see*, Finding of Fact "66"). Further, given petitioner's income level, if additional funds were needed to maintain the brownstone, she could easily provide such funds. Also diminishing the significance of petitioner's retention of the brownstone is the fact that Ms. Sanders, who owned the property with petitioner, continued to live there. This circumstance clearly would complicate any sale of petitioner's interest in the property. Additionally, the record shows that petitioner purchased the brownstone, in part, for investment purposes (*see*, Finding of Fact "4"). Retention of a real estate investment in New York is less significant than retention of a residence for purposes of determining domicile

The fact that the rented Addison Avenue home was largely furnished would also seem to weigh against petitioner's position. Petitioner, however, owned little of the furniture in the brownstone. She thus had little furniture to bring with her to California.

Ms. Sanders' continued residence and domicile in New York would also appear to lend support to the Division's position. As petitioner notes in her brief, "petitioner and Ms. Sanders were not spouses in the traditional sense, but were long-time partners." Indeed, the two had been together for more than 30 years at the time petitioner took the job at EPC and together had purchased, rehabilitated and resided in the brownstone. They continued to maintained their relationship during petitioner's time in California, with petitioner visiting Ms. Sanders in New York and Ms. Sanders visiting petitioner in California. Additionally, Ms. Sanders took care of petitioner's personal finances and tax matters. As noted previously, the maintenance of family ties in New York is a factor in determining domicile (*see, Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852, 613 NYS2d 294). Further, the

Division's regulations provide that "generally, the domicile of a husband and wife are the same" (20 NYCRR 105.20[d][5][I]). Although petitioner and Ms. Sanders were not spouses or family in the traditional sense, their relationship had the same characteristics of such relationships. Petitioner correctly notes, however, that if spouses may have different domiciles (*see*, 20 NYCRR 105.20[d][5][I]; ***Matter of Moed***, Tax Appeals Tribunal, January 26, 1995), then she and Ms. Sanders, who are not legally married, may also lead separate lives and have separate domiciles. Thus, the fact that Ms. Sanders chose to remain a domiciliary of New York did not preclude petitioner from acquiring a California domicile. Here, petitioner concluded that her move to California would not adversely affect her 33-year relationship with Ms. Sanders. Petitioner had traveled frequently during her career and often had been away from the brownstone for an entire Monday-through-Friday period (*see*, Finding of Fact "16"). Further, petitioner and Ms. Sanders had previously lived apart for a time while Ms. Sanders pursued her education (*id.*). Under such circumstances, while Ms. Sanders' domicile may be a factor weighing against petitioner's asserted new domicile, it is not fatal to petitioner's position.

The record also contains other secondary indicators of domicile which appear, at first glance, to solidly support the Division's position, but which, upon review, lend little support to the Division. Specifically, the New York residence of petitioner's mother and three of her siblings on Long Island is a continuing family tie to New York for petitioner. This factor is offset, however, by the presence of three of petitioner's siblings on the West Coast, one of whom resided in California. Another continuing New York tie for petitioner was her dog, jointly owned by petitioner and Ms. Sanders, who remained in New York with Ms. Sanders. The dog, however, was jointly owned by petitioner and Ms. Sanders, and Ms. Sanders was in a better position to care for the dog (*see*, Finding of Fact "17"). The significance of this New York connection is thus diminished. Finally, petitioner's use of New York professionals in the

preparation of her tax returns during her time in California is also a continuing tie to New York. With respect to petitioner's relationship with the New York accounting firm of Cornick, Garber, and Sandler, who prepared petitioner's New York returns for the years at issue, petitioner's use of this firm arose from petitioner's California employment as CEO of EPC. The significance of this secondary indicator of domicile is thus diminished.

H. While petitioner unquestionably retained ties to New York during the years at issue, such ties did not preclude her from changing her domicile to California. It is not necessary for a taxpayer to sever all ties to New York to establish a change in domicile (*see, e.g., Matter of Sutton*, Tax Appeals Tribunal, October 11, 1990). As discussed previously, domicile is largely a matter of intent. Petitioner credibly testified at hearing as to her intent to live in California and to make her home there. Further, by her conduct, i.e., the "objective manifestation" of her intent (*see, Matter of Simon, supra*), petitioner has clearly and convincingly established that she was domiciled in California during the years 1996 and 1997 and was therefore a nonresident of New York during those years.

I. In light of Conclusions of Law "F", "G", and "H," Issue II is moot.

J. The petition of Charlotte Gemmel is granted and the Notice of Deficiency dated February 5, 2001 is cancelled.

DATED: Troy, New York
November 10, 2004

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE